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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

JOSE MANUEL SOSA,

Petitioner,

-vs- No. 6414

THE HONORABLE OLIVER C. MAXWELL, as Circuit Judge of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, Florida,

Respondent.

RICHARD AUSTIN GREENE,

Petitioner,

-vs- No. 1195

THE HONORABLE OLIVER C. MAXWELL, as Circuit Judge of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, Florida,

Respondent.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioners' statement of the case and facts as substantially reflecting the course of prior proceedings.

ISSUES INVOLVED

Respondent accepts petitioners' statement of the issues involved insofar as they delimit the issues before this Court.

ARGUMENT

> "In considering this case, we are mindful of the oft-repeated rule that in a criminal prosecution a verdict of guilty will not ordinarily be disturbed upon the ground of the insufficiency of the evidence from which all the elements of the crime may have been legally found or inferred, and it does not appear that the jury was not governed by the evidence adduced at the trial. Exceptions to this rule, however, have been previously recognized by this court. . .where the verdict was not in accord with the manifest justice of the case." Fuller v. State, 110 So. 528 (Fla. 1926).

Petitioners herein argue that the double jeopardy clause of the Fifth Amendment precludes respondent from retrying them for first degree murder because their first jury conviction for

first degree murder was reversed by the Supreme Court of Florida because, in its view of the evidence at their former trial, "the interests of justice require a new trial" - Sosa v. State, 215 So.2d 736 (Fla. 1968). The respondent would maintain: (1) petitioners have not properly preserved their federal question for review by this Court; and (2) no question of double jeopardy is presented by an appellate court's reversal of a jury conviction because its view of the "weight" of the evidence indicates the "interest of justice" would better be served by having another jury pass upon it.

Initially, the respondent would submit petitioners have not properly preserved their federal question for review. Petitioners' present posture before this Court is that they are seeking review of an order denying a writ of prohibition directed to a pre-trial order on remand after reversal of their conviction by the Supreme Court of Florida. When the Supreme Court of Florida originally reversed and remanded their convictions for retrial, the petitioners did not file a petition for rehearing stating, in effect "You cannot remand my case for a new trial. If the evidence is insufficient, the double jeopardy clause requires you to direct an acquittal and discharge".

Perhaps, as respondent will set forth more fully, infra, there is sound reason why petitioners now present this argument here and did not do so there. Be that as it may, in United States v. Elchuck, 159 F. Supp. 689 (S.D.Tex. 1957), a federal defendant made a plea in bar on the ground his prior conviction was reversed for insufficient evidence. The court rejected the plea in part because "Elchuck's conviction was reversed on his appeal and he acquiesced in it. He got the relief he asked -- reversal of the judgment. He did not even move for rehearing in the Court of Appeals and ask for acquittal there because of insufficient evidence as was done, without success, in Bryan v. United States [338 U.S. 552]".- 159 F. Supp. at 690-1 (Court's emphasis).

Petitioners next submit that their attempted retrial on remand violates the double jeopardy provisions of the Fifth Amendment. Respondent maintains that such a procedure, far from infringing upon any constitutional rights of convicted defendants, grants them a "boon" which clearly advances the interests of justice in criminal prosecutions.

Moreover, respondent would here first emphasize what issues are not presented by this case. We are not dealing with a retrial after a verdict of acquittal as was the case in Ashe v. Swenson, 397 U.S. 436 (1970). Furthermore, as emphasized

by the opinion below and the Supreme Court of Florida in Fuller v. State, supra, we are not dealing with a situation where the trial court should have granted a motion for directed verdict, i.e., where the state has not prima facie established the corpus delicti of the crime. In short, we are dealing with a situation where there is some evidence of each element (and hence where the appellate court could affirm), but where the appellate court's view of the weight of the conflicting evidence leads it to believe that the "interests of justice" would better be served by giving the defendant a "second chance" before another jury (particularly where, as in this case, the ultimate penalty has been imposed).

Respondent maintains the argument herein advanced by petitioners was flatly rejected by this Court in Bryan v. United States, 338 U.S. 552, 560 (1950). The continued vitality of the Bryan rule is amply demonstrated by this Court's citation of it with approval in United States v. Tateo, 377 U.S. at 465-6 (1964), and North Carolina v. Pearce, 395 U.S. at 720, n. 15 (1969).

Petitioners attempt to "explain away" the Bryan decision by stating that the reversal there was not "really" for "pure" insufficiency of the evidence. Two points are relevant here. First, the respondent does not purport to be able to "read the minds" of the members of this Court who decided Bryan--respondent can only read the plain language of this Court's opinion which considered the reversal to be for insufficiency. Respondent can only read

the plain language of this Court's subsequent references as to the holding of Bryan, e.g., Tateo, supra. Moreover, if this is to be the controlling point, then the respondent would submit that a perusal of the opinion of the Supreme Court of Florida reversing the petitioners' convictions discloses that only one Justice (Thomas) reversed for "pure" insufficiency of the evidence, since three of the Justices who concurred in the per curiam reversal (Ervin, Drew and Thornal) also would have reversed for legal error (215 So.2d at 737-46). Hence, petitioners are hardly in a position to herein assert their reversal was for "pure" insufficiency.

Petitioners place heavy reliance upon this Court's decision in Ashe, supra. Respondent fails to see the relevancy of the rule announced in Ashe to the facts of the case sub judice. It would take a process of judicial metastasis to convert a decision founded upon a prior jury acquittal into a bar to re-prosecution after a prior jury conviction where the appellate court has reversed--not because evidence of any element of the crime is lacking, but because it feels "uneasy" about the weight of the evidence.

Respondent would also urge the Court to seriously consider the consequence which must follow if it accepts the carrot so temptingly offered by petitioners.

What would be the effect on appellate courts reviewing a verdict where some evidence of each element of the crime was present but where the verdict appeared to be perhaps "unjust" given the court's view of the weight of the evidence? The court would then be in the unhappy position of either suppressing its qualms and affirming the verdict or it could reverse--and know full well that this meant automatic discharge of the defendant. (Except perhaps here where there are degrees of the crime.) Respondent suggests the more probable reaction of most courts in this dilemma would be to "wash their hands of the matter", say "there is evidence of each element of the crime and the jury is the body to weigh conflicting evidence", and then affirm. We suggest this is the reason petitioners now make this argument before this Court and why they did not advance it on a rehearing motion before the Supreme Court of Florida on their original reversal and remand.

This Court in Tateo, supra, gave full recognition to this "Charybdis-Scylla" choice, when it stated, after reviewing several prior decisions, including Bryan, that:

> "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the Ball principle are the implications of that principle for the sound administration of justice.

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest. The underlying purpose of permitting retrial is as much furthered by application of the rule to this case as it has been in cases previously decided."

Respondent thus maintains the petitioners have not presented a substantial federal question in light of prior decisions of this Court. Bryan v. United States, supra. The claim they present

poses no substantial former jeopardy question and would only impede the advancement of justice.

The petitions should be denied.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

RONALD W. SABO
Assistant Attorney General

Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have forwarded copies of the foregoing Response to Petition for Writ of Certiorari to Petitioner Sosa's counsel, the Honorable Arnold D. Levine, Levine & Freedman, P.A., 725 E. Kennedy Boulevard, Tampa, Florida 33602, and Petitioner Greene's counsel, the Honorable A. Dallas Albritton, Jr., Albritton, Sessums, Ryder & Grandoff, 925 First Federal Building, Tampa, Florida 33602, by mail, this _____ day of March, 1971.

RONALD W. SABO
Assistant Attorney General

Of Counsel.